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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

GUADALUPE MEDRANO, SR.
and
AMPARO MEDRANO,

Petitioners,

vs.

CITY OF LOS ANGELES, RODOLFO ROMERO,
DONNELLY MOWRY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in an action brought under 42 U.S.C. § 1983, a plaintiff may rely upon a state law imposing vicarious liability on a public entity for injuries caused by a public entity's employee, to impose liability on the entity for its employee's acts in violation of § 1983.

2. Whether California Government Code § 815.2, which imposes vicarious liability on public entities for injuries caused by an employee of the entity, is inconsistent with 42 U.S.C. § 1983.

3. Whether, under *United Mine Workers of America v. Gibbs*, a district court may dismiss plaintiffs' pendent state court claims where, because of state law procedural rules, the plaintiffs are prohibited from prosecuting their state law claims in state court unless the plaintiffs dismiss their related federal claims in federal court.

4. Whether the after-the-fact determination by a public entity that an employees' actions were in accordance with the policies of the public entity is sufficient to make a *prima facie* showing of public entity liability under *Monell v. Department of Social Services*.

QUESTIONS PRESENTED
(Cont'd)

5. Whether the district court's reference to the decedent as "disgusting" and to plaintiffs' counsel as "stupid," "shoddy," "lousy," "disgusting," "idiotic," "lazy or incompetent" "shyster" lawyers is sufficient to show that the district court was biased against plaintiffs and their counsel, incapable of fairly exercising its discretion, and to require that the matter be assigned to another district judge on remand.

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IN THE SUPREME COURT OF THE UNITED STATES
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GUADALUPE MEDRANO, SR.
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Petitioners,

vs.

CITY OF LOS ANGELES, RODOLFO ROMERO,
DONNELLY MOWRY,

Respondents.

Petitioners Guadalupe Medrano and Amparo Medrano respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in this proceeding on September 8, 1992.

OPINION BELOW

The opinion of the Court of Appeals, reported at 973 F.2d 1499 (9th Cir. 1992), appears in the Appendix hereto [hereinafter "Apx."]. No opinion was rendered by the District Court for the Central District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was filed on September 8, 1992. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on December 23, 1992. (Apx. A-1.) An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of *en banc* consideration. This petition for certiorari was filed within 90 days of December 23, 1992. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

§ 1988. Proceedings in vindication of civil rights.

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons shall be exercised and enforced in conformity with the laws of the United States, so far as the same are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction . . . is held, so far as the same is

not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the courts in the trial and disposition of the cause."

California Government Code:

§ 815.2 [Liability for employee's acts.]
(a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee.

STATEMENT OF THE CASE

On March 21, 1988, Lucia Medrano Casillas called the Los Angeles County Fire Department paramedics because her brother, Ruben Medrano, had closed himself in the bathroom of his home and was threatening suicide. The Los Angeles Police Department and, eventually, the Special Weapons and Tactics Team (SWAT) responded to the location. After a short delay, the supervisors at the scene, without consulting or attempting to consult any medical or mental health professionals, without awaiting the arrival of decedent's counselor or the police department psychologist who had been summoned, and over the objections of decedent's sister and three brothers who had also quickly arrived at the location, ordered defendants Mowry and Romero to break into the bathroom and try to take decedent by force, contrary to accepted standards in the law enforcement profession for

handling possibly suicidal persons (Vol. III, 10/12/89, RT 10, 12, 14, 14 [Tumas]; 10/11/89, RT 149 [Hancock]; 10/11/89, RT 93, 94, 102, 135, 140 [Anderson]. As a result, decedent was shot twice through the chest and once between the eyes as he lie flat on his back in the bathroom of his home.

The exact circumstances surrounding the fatal shooting are disputed. (Apx. at A-7.) Petitioners claimed that Mowry and Romero broke into the bathroom, killed decedent, and then, in an effort to cover up their actions, placed a gun on decedent's chest and fired it. The Medrano family, who were down the street from decedent's residence, heard three consecutive shots and then a delayed shot at the end. (Apx. at A-7.) Circumstantial evidence showed that defendants version of the shooting was physically impossible. Decedent could not have been sitting up, because of the location of bullet holes. The Los Angeles County Deputy Coroner who did the autopsy testified that a flash burn on decedent's chest caused by the gun decedent allegedly fired was post mortem.[1] Expert testimony (from an LAPD expert called by defendants) about the burn showed that the gun was held on decedent's chest when it was discharged (not held away from decedent's chest as defendants claimed), in a position impossible for decedent to have held the gun. [11/3/89 RT 80, 81, 82, 107, 116-18]

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[1] Petitioners completely disagree with the Ninth Circuit's statement that "both expert pathologist at trial stated that the flash burn could be ante-mortem." (Apx. at A-12.) Any fair reading of Deputy Medical Examiner Dr. Joan Shipley's testimony shows that she was firm in her conclusion that the burn was after death: "It's a wound that occurred in the post-mortem period." (10/26/89, RT 398; see also 10/26/89 RT 399, 436, 439.)

After the incident, LAPD conducted an investigation of the incident and prepared a report [Exhibit 137] which was reviewed by command staff, including the Acting Chief of Police, David Dotson. Chief Dotson then prepared a report to the Board of Police Commissioners of the City of Los Angeles. [Exhibit 146] According to Chief Dotson and his report to the Board of Police Commissioners, the actions of the officers were in accordance with the policy of the LAPD. [10/20/89, RT 14:12-17]

Petitioners and decedent's surviving siblings filed a complaint on May 17, 1988 charging federal civil rights violations only.[2] Petitioners had two main theories. One was that the break in was wrongful. The second was that the shooting inside the bathroom and the subsequent cover up of what really happened was wrongful.

On September 5, 1988, Petitioners moved to amend their complaint to add state law causes of action, including a state law cause of action for wrongful death (negligence) under California Code of Civil Procedure §§ 377(b)(1)

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[2] As parties to the federal action, the Ninth Circuit erroneously includes decedent's widow, Linda Medrano, and siblings, brothers Guadalupe Medrano, Jr., Rene Medrano, and Louie Medrano, and sister Lucia Medrano Casillas. ("The widow, parents, and siblings of Ruben Medrano seek damages . . . under 42 U.S.C. section 1983 for shooting of Medrano." Apx. at A-5.) The siblings, plaintiffs along with Petitioners when the complaint was filed, were dismissed as parties in August, 1989, when the trial court held that they could not state a federal claim and dismissed without prejudice the siblings' state law claim. When the case when to trial in October, 1989, the only plaintiffs were Petitioners, decedent's parents. Decedent's widow Linda Medrano was never a plaintiff in the federal action.

and (2)[3]. [Excerpt of Record ["Excerpt"] page 9.] The amended complaint alleged, *inter alia*, that "the City of Los Angeles is also liable under California Government Code Section 815.2 for any wrongful act of any employee." (Excerpt page 19.) Defendants filed a notice of non-opposition and the motion to amend was granted. (Excerpt, page 2.) However, nearly a year later on August 16, 1989, the district court on its own motion dismissed all state law claims "without prejudice." (Apx. at A-15; Excerpt, page 5.)

Jury trial began October 10, 1989. After evidence was presented, the court dismissed all the defendants except Mowry and Romero, ruling that "nothing in the acts of these two officers was approved by anybody." (11/3/89, RT 186, 188.) The jury returned a verdict for Mowry and Romero. In support of plaintiffs' motion for a new trial, three of six jurors filed declarations under oath stating that "the police officers who ordered the entry into the bathroom were liable for the death of Ruben Medrano. I would have voted to impose liability against these police officers had I been permitted by the Court to do so." [Excerpt 88, 89, 90] A fourth juror stated she would have

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[3] The Ninth Circuit incorrectly asserts that Petitioners' "state claims involved complicated state law issues of ascendant and collateral heirship, intestate succession, negligent retention, and negligent infliction of emotional distress." (Apx. at A-15.) In truth, Petitioners brought only two state law claims: wrongful death and negligent retention. Excerpts of Record, pp. 23-24 (First Amended Complaint, Counts III and IV). Both claims are grounded in simple negligence and do not involve "ascendant and collateral heirship, [or] intestate succession." Petitioners did not assert the negligent infliction of emotional distress claim (Count V). That claim was asserted by decedent's siblings, Guadalupe Medrano, Jr., Louie Medrano, Rene Medrano, and Lucia Medrano Casillas.

"most likely voted to impose liability against those police officers had I been permitted by the Court to do so." [Excerpt page 94][4]

Three jurors also stated in declarations that "based on what I saw of his actions and demeanor in the courtroom, I believe that Judge Hauk had pre-decided the case and had made up his mind that the plaintiffs should lose before the case even began. [Para.] I was shocked by Judge Hauk's handling of this case." [Excerpt pages 88, 89, 90] The fourth added, "I felt deeply sorry for the Medrano family that their case had to be tried before Judge Hauk. I have sat as a trial juror on other federal cases and I believe that Judge Hauk's behavior was completely out of line." [Excerpt page 94]

Shortly after the district court dismissed the pendent claims, on September 5, 1989, Petitioners and their children[5] filed a complaint in Los Angeles Superior Court alleging state law wrongful death and negligence claims. *Medrano v. City of Los Angeles*, Case No. C736435. The Superior Court dismissed plaintiffs' complaint, holding that pursuant to California law, in particular *Mattson v. City of Costa Mesa*, 106 Cal. App. 3d 441, 164 Cal. Rptr. 913 (1980), Petitioners and decedent's siblings were barred by the district court judgment from litigating their state court wrongful death claim. All

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[4] The jurors also publicly "blasted a federal judge for barring them from punishing commanding officers who ordered that the despondent veteran's home be stormed." [Excerpt page 83]

[5] In the state court complaint, the plaintiffs consisted of Petitioners Guadalupe Medrano, Sr. and Amparo Medrano, their sons Guadalupe Medrano, Jr., Louie Medrano, and daughter Lucia Medrano Casillas.

plaintiffs in the state court action appealed but the Second District Court of Appeal of the State of California affirmed, Case No. 2 Civil B053783.

After the California Court of Appeal affirmed the dismissal of the state court complaint, the Ninth Circuit Court of Appeals reversed and remanded for a new trial Petitioners' federal claims against Mowry and Romero. The court, though, upheld the dismissal of the City of Los Angeles, holding that it would not be consistent with 42 U.S.C. §§ 1983 and 1988 to permit the State of California to make public entities liable for the civil rights violations of their employees [Apx. at A-14], upheld the dismissal of Petitioners' state law wrongful death claims, even though the practical effect of that dismissal "without prejudice" was to preclude plaintiffs from ever having the wrongful death (negligence) claim adjudicated in any forum [Apx. at A-15, A-16], upheld the dismissal of the City because there was no evidence that the break-in was "reckless and ill-advised." [Apx. A-12], and refused plaintiffs' request to assign the matter to a different judge. [Apx. at A-19, A-20].

For Petitioners Mr. and Mrs. Medrano, the result is that they have lost their best claims against the responsible entity and the only party which is capable of paying the damages (the City of Los Angeles). Petitioners now face retrial before a district court judge who has evidenced his hostility so overtly that even the trial jurors, normally very deferential to the court, were shocked and outraged.

REASONS FOR GRANTING THE WRIT

1. The Ninth Circuit's refusal to recognize California Government Code § 815.2 is inconsistent with this Court's decision in *Monell v. Department of Social Services* holding that municipalities are "persons," conflicts with long standing circuit authorities, and unfairly deprives civil rights victims of important rights.

Section 815.2(a) of the California Government Code provides: "A public entity is liable for injury proximately caused by an act or omission of an employee of the entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against the employee." "The effect of this statute is to incorporate 'general standards of tort liability as the primary basis for respondent superior liability of public entities.'" *Torsiello v. Oakland Unified Sch. Dist.*, 197 Cal. App. 3d 41, 44-45 (1987) (citation omitted). The California Supreme Court recently affirmed that Cal. Gov't Code § 815.2(a) should be given the broadest possible reach "to ensure that the victims of police misconduct are compensated." *Mary M. v. City of Los Angeles*, 54 Cal. 3d 202, 211, 215, 285 Cal. Rptr. 99, 106 (1991).[6]

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[6] As the additional purposes of imposing vicarious liability, the *Mary M.* court set forth the justifications of encouraging the employer to take measures to deter the conduct and spreading the cost of misconduct to the community as a whole. *Compare Mary M.*, 54 Cal. 3d at 211, 285 Cal. Rptr. at 103 *with Monell* at 436 U.S. 694, 98 S. Ct. at 2037.

The Ninth Circuit reasoned that the this Court in *Moor v. County of Alameda*, 411 U.S. 693 (1973) and the circuit in *Moor v. Madigan*, 458 F.2d 1217 (9th Cir. 1972), *aff'd in part*, 411 U.S. 693 (1973), rejected reliance upon Cal. Gov't Code § 815.2 (Apx. at A-14.)

The Ninth Circuit's analysis is clearly wrong. The Ninth Circuit fails to acknowledge the effect of this Court's later decision in *Monell v. New York Department of Social Services*, 436 U.S. 658 (1978).

In *Moor v. County of Alameda*, 411 U.S. 693 (1973), this Court refused to extend federal jurisdiction over a public entity vicariously liable for the tortious conduct of its police agents by virtue of Cal. Gov't Code § 815.2(a). The Court reasoned that creating federal jurisdiction over a public entity through reliance upon the California rule of statutory liability would be "inconsistent" with the Congressional intent that governmental entities were not "persons" liable for federal civil rights violations--true as of 1973, but not true today. At the same time, though, *Moor* approved the reliance on state law to hold sheriffs vicariously responsible (*Hesselgesser v. Reilly*, 440 F.2d 901 (9th Cir. 1971) and *Lewis v. Brautigam*, 227 F.2d 124 (5th Cir. 1955)) on the basis that when the circuits "found authority for the incorporation of state [vicarious liability] law into federal law in § 1988, . . . [the courts were] acting in the context of a suit brought against [a] sheriff," who, unlike a public entity, was a "person" subject to suit. 411 U.S. at 704 n. 17, 93 S. Ct. at 1793 n. 17. As the Ninth Circuit explained in its *Moor* opinion:

> Clearly, the Sheriff held liable in *Hesselgesser* was a "person" within the

> meaning of the Civil Rights Act, as defined by *Monroe*. Thus, imposition of liability upon the Sheriff was appropriate and in no way conflicts with the *Monroe* holding. (*Moor v. Madigan*, 458 F.2d at 1220.)

Five years after deciding *Moor*, this Court eradicated the only distinction between the *Hesselgesser* Sheriff and a public entity. In *Monell v. New York Dept. of Social Services*, 436 U.S. 658 (1978), the Court reversed *Monroe's* holding that public entities were not "persons" subject to suit under 42 U.S.C. § 1983. While holding for the first time that public entities can be sued under § 1983, the Court declined to impose vicarious liability *as a matter of federal law*. Instead, the *Monell Court* held that § 1983 imposed liability upon a public entity upon a showing of a unconstitutional policy, practice or custom of that entity. 436 U.S. at 690.

The Ninth Circuit's analysis of the City of Los Angeles' liability under Cal. Gov't Code § 815.2 expressly rests upon two decisions which turned on a distinction that no longer exists. Because *Monell* reversed, in part, *Monroe*, the Ninth Circuit's conclusion cannot be reconciled with the holdings of *Hesselgesser* and *Lewis*. A policymaker such as a Sheriff or Chief of Police is similar to a public entity in that proof of an unconstitutional policy, practice or custom is ordinarily required to establish liability. *E.g., Larez v. City of Los Angeles*, 946 F.2d 630, 645-46 (9th Cir. 1991). What is the sense of imposing vicarious liability on a policymaker but not on a public entity?

The Ninth Circuit's refusal to incorporate, through 42 U.S.C. § 1988, Cal. Gov't Code § 815.2(a) to this 42 U.S.C. § 1983 police misconduct action conflicts with the Ninth Circuit's decisions in *Hesselgesser v. Reilly*, 440 F.2d 901, 903 (9th Cir. 1971) (applying Washington statute providing vicariously liability of sheriff for wrongful acts of deputies to § 1983 action) and *Redman v. County of San Diego*, 942 F.2d 1435 (9th Cir. 1991). In *Redman*, the court stated, *en banc*:

> In a section 1983 action in this circuit, *vicarious liability may not be imposed in the absence of a state law imposing such liability*. *Mosher v. Saalfeld*, 589 F.2d 438, 441 (9th Cir. 1978), *cert. denied*, 442 U.S. 941, 99 S. Ct. 2883, 61 L. Ed.2d 311 (1979). Redman brought no such law to our attention. In the absence of such a law, the state official must play a personal role in the constitutional deprivation to be liable.
> (942 F.2d at 1446 [footnote omitted] [emphasis added].)

In this case the Medranos brought precisely "such law" to the court's attention. Petitioners claim that just as the *Hesselgesser* sheriff who had no personal involvement in the underlying unconstitutional conduct could be held vicariously liable, based on application of Washington state law, for the violations of plaintiff's civil rights, so too should the City of Los Angeles be vicariously liable, based on application of Cal. Gov't Code § 815.2, for the violations of the Medranos' civil rights.

The broader view on the incorporation of state law into section 1983 actions is strongly supported by a recent analogous decision, *Cornwall v. City of Riverside*, 896 F.2d 398 (9th Cir. 1990). In *Cornwall* the plaintiff refused to accept from a municipality payment of punitive damages awarded by the jury in a civil rights action against some of its police officers, although Cal. Gov't Code § 825(b) authorizes such indemnification. Plaintiff argued that the California law subverted federal policy set forth in *City of Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2d (1981), which immunizes public entities from punitive damage awards under the Civil Rights Act.

The Ninth Circuit declined to apply such a narrow view of incorporation, upholding the application of the indemnification statute because *City of Newport* "is not addressed to the exercise of the authority conferred by the California legislature." 896 F.2d at 400. Similarly, *Monell* should not be read to deprive the California legislature of its authority to provide for the vicarious liability of public entities for the civil rights violations of their employees.

Cornwall arrived at its result even though permitting cities to pay punitive damage awards against police officers obviously undercuts the deterrent effect of such awards on the officers' conduct and thereby undermines the remedial purposes of the Civil Rights Act. The *Cornwall* court focused on a countervailing concern--that if the municipality were prohibited from paying punitive damage awards there would be plaintiffs with unsatisfied judgments due to the limited financial resources of individual defendants. 896 F.2d at 400.

Policy considerations cut even more strongly in favor of the rule of vicarious liability advanced by Petitioners. Section 825(a) of the California Government Code mandates that public entities provide a legal defense and indemnity as to compensatory damages for their employees (indemnity for punitive damages being elective). The result, as is well known to practitioners in this area of the law, is that the real party in interest in the litigation, the public entity, is not before the jury unless the plaintiff successfully shoulders the burden of proving up a *Monell* claim. The resulting absence of the entity defendant has the practical effect of stirring juror sympathy for the defendant officers, sometimes unfairly depriving plaintiffs of verdicts or minimizing the compensatory damages awarded. The increased risk of defeat and reduced recoveries seriously undermines both the salutary and deterrent effects of the Civil Rights Act.

In enacting Cal. Gov't Code § 815.2(a), the California State Legislature remedied this unfairness by bringing the public entity itself before the jury. Rather than conflicting with the goals of the Civil Rights Act, the vicarious liability provision codified in Cal. Gov't Code § 815.2(a) furthers those fundamental societal interests.

2. **The Court should determine whether, under the Court's decision in *United Mine Workers of America v. Gibbs*, Federal Courts must consider the actual availability of a state forum when dismissing pendent state law claims and resolve a conflict between the Ninth and Second Circuits.**

The exercise by district courts of pendent jurisdiction is a matter of substantial concern because of the broad and seemingly unreviewable discretion given district courts, the difficulty in obtaining appellate review, the stresses which allocating scarce judicial resources provoke, and the gross unfairness and injustice that the present rules can, and in this case, have caused.

District courts routinely dismiss pendent claims (now called supplemental claims[7]) as a matter of course, claiming alleged "jury confusion" and blandly stating that the dismissals are "without prejudice," to the filing and prosecution of the dismissed claims in state court. *E.g.*. *Miller v. Lovett*, 879 F.2d 1066, 1069 (2nd Cir. 1989)[8]; *Perez v. Ortiz*, 849 F.2d 793, 798 (2nd Cir. 1988). Dismissals are ordinarily reversed only upon a showing of an abuse of discretion (*Moor v. County of Alameda*, 411 U.S. 693, 712 (1973)), a difficult standard to meet both

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[7] By Pub.L. 101-650, Title III, § 310(a) (effective December 1, 1990), Congress codified the federal court's pendent jurisdiction under the title "Supplemental jurisdiction" and state law claims formerly known as pendent claims are now called supplemental claims. See 28 U.S.C.A. § 1367.

[8] In *Miller*, the Second Circuit quoted the district judge as stating "'courts in this district have repeatedly discouraged pendent claims in section 1983 litigation.'"

procedurally and substantively.[9]

Even though a dismissal is ostensibly without prejudice, in fact, dismissal of pendent claims is -- in jurisdictions such as California -- dismissal with prejudice. In California, a plaintiff may not prosecute his or her state law claims in state court after dismissal by the federal court. In *Mattson v. City of Costa Mesa*, 106 Cal. App. 3d 441, 164 Cal. Rptr. 913 (1980), the California Court of Appeal held that "once the federal court has declined to exercise pendent jurisdiction over the state claim, if the plaintiff then elects to proceed to trial and judgment in the federal court, his entire cause of action is either merged in or barred by the federal court judgment so that he may not thereafter maintain a second suit on the same cause of action in a state court." (106 Cal. App. 3d at 455, 164 Cal. Rptr. at 922.)

Therefore, when the district court dismissed Mr. and Mrs. Medranos' state law negligence claims "without prejudice," the court effectively dismissed the claims with prejudice. This is not just a hypothetical. After the federal court dismissed "without prejudice" Petitioners' negligence claims, Mr. and Mrs. Medrano refiled their claims in state court. Relying upon *Mattson*, the state trial court held that the federal judgment barred prosecution of the state law claims and dismissed the Medranos' state complaint. Upon the Medranos' appeal, the California

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[9] Because of the one final judgment rule (28 U.S.C. § 1291), a dismissal of supplemental claims ordinarily would not be appealable. A party aggrieved by the dismissal most likely would have to lose on the merits of his federal claims before he would be in a position to secure appellate review of the dismissal.

Court of Appeal, following *Mattson*, affirmed the dismissal. See *Medrano v. City of Los Angeles*, California Court of Appeal, Second Appellate District, No. B053783 (unpublished decision).

Despite the apparent unfairness to Petitioners by the district court's refusal to exercise pendent jurisdiction over Petitioners' state law claims, the Ninth Circuit declined to acknowledge that unfairness or directly address California law under *Mattson* as it affects Petitioners' ability to prosecute their claims in state court. (Apx. at A-15, A-16.[10]) Instead, the Ninth Circuit stated that Petitioners "should have selected the state court." (Apx. at A-16.)

The Ninth Circuit's position is internally inconsistent and contrary to settled law. Petitioners selected the federal forum to try all their claims since all claims arose from a common nucleus of operative fact. If, as suggested by the Ninth Circuit, dismissal of the pendent claims was proper because of possible jury confusion, dismissal does not eliminate it; under *Mattson*, dismissal simply transfers the confusion to state court. The only way the alleged confusion is "cured" is if, once the pendent claims are dismissed, the plaintiff then abandons the state law claims. But in that case, dismissal unfairly operates to deprive plaintiff of his state law claims. *United Mine Workers v. Gibbs*, 383 U.S. 715, 727 (1966); *see also Miller v. Lovett*, 879 F.2d 1066, 1072 (2nd Cir. 1989).

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[10] Petitioners raised these issues in their Opening Brief (page 46) and in their Petition for Rehearing and Suggestion for Rehearing *En Banc* (pp. 3-5).

This Court in *Gibbs* stated that district courts should consider the "fairness to litigants." 383 U.S. at 726. Is it fair for a district court, by dismissing pendent claims, to deprive a party of all opportunity to prove state law claims? *Gibbs* does not expressly discuss the weight, if any, which should be given to a refusal to exercise jurisdiction that deprives a plaintiff of any chance to prove his or her state law claims. However, *Gibbs* assumes that dismissed state law claims can be tried separately in state courts. 383 U.S. at 726 (Dismissal of state claims may be proper to "promote justice between the parties, by procuring for them a surer-footed reading of applicable law."). Plainly, a litigant can only obtain a "surer-footed reading of applicable law" if there really is a forum which is willing to open the book. Where, as in California, the courts will not consider any state law claim if the plaintiff has prosecuted a related federal claim, there is no available state forum.

The Second Circuit in *Miller v. Lovett*, 879 F.2d 1066 (2nd Cir. 1989), confronted this very issue but unlike the Ninth Circuit, the Second Circuit held that under *Gibbs*, the district court's refusal to exercise pendent jurisdiction was an abuse of discretion and reversible error. In *Miller*, the plaintiff sued various police officers under 42 U.S.C. § 1983, alleging excessive force in violation of his Fourth Amendment rights. The plaintiff also raised Connecticut state law claims for negligence, battery and assault. The district court dismissed the pendent claims and defendants ultimately prevailed on the federal claims. On plaintiff's challenge to the dismissal of the pendent claims, the Second Circuit noted that Connecticut law holds "that an award of damages in a § 1983 action collaterally estops the plaintiff from recovering

damages in a subsequent state court lawsuit." (879 F.2d at 1072.) The court of appeal then found the dismissal of the pendent claims improper because:

> If these federal and state claims are so tightly interwoven that a decision on the former will collaterally estop litigation of latter, we see no principled reason for refusing to exercise pendent jurisdiction, and potential injustice in failing to do so. (879 F.2d at 1073.)

The potential injustice referred to by the Second Circuit is the injustice Petitioners suffered--the absence of an actual state forum to litigate their state claims notwithstanding the district court's illusory dismissal "without prejudice." It is an injustice faced by every § 1983 litigant in California who has his pendent claims dismissed.

Where a state court is unavailable, Petitioners submit that a federal court should be obligated to consider that factor in determining whether to exercise its pendent jurisdiction. Such a requirement would appear implicit by this Court's decision in *Gibbs*. *Miller, supra*; *Cf.* C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure*, § 3567.1 at 127-32 & n.17 (2d Ed. 1984) (discussing cases holding that the absence of state forum because statute of limitations had run is a factor that weighs in favor of exercising pendent jurisdiction). The Ninth Circuit now refuses, contrary to the Second Circuit, to consider the actual availability of state court forum in exercising its pendent jurisdiction. To resolve this conflict and promote the justice and fairness to litigants upon which the exercise

of pendent jurisdiction is grounded, this Petition should be granted.

3. This Court should determine whether a public entity's after-the-fact determination that an employees' actions were in accordance with the policies of the public entity is sufficient to make a *prima facie* showing of public entity liability under *Monell v. Department of Social Services.*

The Court in *Monell v. Department of Social Services, supra,* held that a public entity may be held liable for a civil rights violation "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . ." 436 U.S. at 694. The Court "expressly [left] further development of this action to another day." *Id.* In *St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988), the Court stated "If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final." Here, petitioners present the question whether the after-the-fact determination by the Chief of Police and the Board of Police Commissioners that the break in was within policy is sufficient to at least make a *prima facie* showing that the actions of the employees were a result of a government custom or policy.

The question is a perplexing one which the Court should resolve. Clearly, the evidence petitioners presented was sufficient to show a constitutionally inadequate failure to train. The Sixth Circuit, in *Russo v. City of Cincinnati*, 953 F.2d 1036 (6th Cir. 1992), addressed exactly this issue

and held:

> [P]laintiffs have offered sufficient evidence to suggest that the training program for police officers offered by the City with respect to the use of force on mentally disturbed persons is constitutionally inadequate, that this inadequacy results from the City's deliberate indifference to the rights of such persons, and that this inadequacy may have directly resulted in Bubenhofer's death.
> (953 F.2d at 1047.)

The question is whether the municipality's after-the-fact ratification of the fruits of its inadequate training is also a sufficient basis for municipal liability. Petitioners suggest that it should be. As the Fifth Circuit held in *Grandstaff v. City of Borger, Texas*, 767 F.2d 161, 171 (1985), even implied after-the-fact ratification may form the evidentiary basis for a determination that the offensive conduct was in accordance with policy and practice:

> As subsequent conduct may prove discriminatory motive in a prior employment decision, and subsequent acts may tend to prove the nature of a prior conspiracy, so the subsequent acceptance of dangerous recklessness by the policymaker tends to prove his preexisting disposition and policy. . . . If the police chief had not known and approved of it beforehand, we would expect a change when he, too, learned the facts.

(767 F.2d at 171 (Citations omitted.))

As can be inferred from the declarations and public statements of the trial jurors, Petitioners presented substantial evidence that the police response to the Medrano family's request for assistance, in particular the decision to force entry without consulting or awaiting the arrival of a medical professional, the psychologist, or decedent's counselor, was seriously mistaken, indeed reckless, not in accord with accepted police standards for handling persons threatening suicide, and caused decedent's death. In part, the evidence consisted of the following:[11]

- Expert testimony of Dr. Bruce Danto, a medical doctor, expert on suicide, and former deputy sheriff member of the Wayne County, Michigan Sheriff's SWAT team, that the police should not have broken in. (10/31/90 RT 39:21 -40:4)

- Expert medical testimony that when decedent was killed, he was in "no danger whatsoever of any kind of death due to morphine injection" [10/31/90 RT 44:9-10], and expert testimony from an experienced drug counselor that decedent was in

[11] Petitioners were not permitted to present additional evidence, including (1) plaintiff's police expert, who was barred from testifying about proper police tactics in handling "barricaded suspect" situations [10/25/89, RT 139, 140] and (2) any written materials, including LAPD training materials, about handling persons threatening suicide.

no danger of dying. [10/26/89 RT 447][12]

♦ The undisputed fact that none of the supervisors sought any medical help to determine whether decedent was actually in any imminent danger of dying before they ordered the break in. (Vol. III, 10/12/89, RT 45 57, 76 (Tumas); 10/11/89, RT 157 (Hancock); 10/11/89, RT 130-131 (Anderson).)

♦ The undisputed fact that the supervisors did not promptly call the LAPD psychologist and then did not wait for him to arrive; the psychologist arrived 10 minutes decedent's death. (10/20/89, RT 128)

♦ The undisputed fact that the police did not wait for decedent's own counselor to arrive and that he arrived a few minutes after decedent was killed. (10/26/89, RT 472)

♦ The fact that decedent's breathing was slow, rhythmic and stable, indicating that he was in no

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[12] The Ninth Circuit incorrectly states that decedent ingested a "lethal dosage of heroin" and that "uncontradicted evidence shows that Medrano would die of a drug overdose unless he was taken from the bathroom and given medical treatment." (Apx. at A-11.) There was no such evidence; indeed, the evidence is the opposite. As noted in the text, Petitioners presented uncontradicted expert medical testimony that decedent was in no danger whatsoever of dying of an overdose. However, Los Angeles County Deputy Medical Examiner Dr. Joan Shipley testified that decedent would not necessarily have died "at all" from the ingested drugs. (10/26/89 RT 387-388.) Even defendants' paid expert Dr. Griffith Thomas acknowledged that it was "virtually impossible" to tell whether decedent would have died from the level of drugs detected in his body after defendants killed decedent. "You can't predict it." (11/1/89 RT XIII-125-126.)

> immediate danger, and the inference that, had the supervisors obtained medical help, they would have learned that there was no danger -- and no exigency -- when they ordered the break in. [10/31/90 RT 401-2; 64:18--65:4]

It is generally accepted that "if control of an incident is elevated to forceful entry, or other types of assaults, it is unlikely that a de-escalation will ever be possible. . . . ; this option should be viewed as a last alternative. No matter how well conceived and executed, these tactical solutions are much more risky to all parties than negotiation." [Klyver, *Psychology in Field Police Work*, Exhibit 118, page 14.] "The officer must recognize that the use of physical control (force) may provoke reactions on the part of the disputant and must be prepared to manage those reaction." "'[H]igh-risk . . . high-gain'" techniques "either work well or cause the situation to deteriorate drastically. As a rule, these techniques should be avoided. . . . The problem with high-risk . . . high-gain methods is that in too many cases they fail to work and the officer is left with a more difficult situation than originally faced." (LAPD, *Dispute Management Handout*, Exhibit 114, pages 24-25.]

4. Certiorari should be granted because the Court of Appeals sanctioned such a departure from the accepted and usual course of judicial proceedings by the district court as to call for an exercise of this Court's power of supervision.

The trial jurors' outspoken public condemnation of the district court's improper behavior attest to the seriousness of the problem for which petitioners respectfully beg this Court's assistance. This district court has long been noted for its improper conduct and it has deteriorated since *Kern v. Levolor Lorentzen,* Inc., 899 F.2d 772 (9th Cir. 1990), *Ward v. Westland Plastics, Inc.*, 651 F.2d 1266 (9th Cir. 1989), *Maheu v. Hughes Tool Co.*, 569 F.2d 459 (9th Cir. 1977), *United States v. Schmitz*, 542 F.2d 782 (9th Cir. 1976), and *United States v. Pena-Garcia*, 505 F.2d 964 (9th Cir. 1974). That the Circuit will do nothing is contrary to the interests of the judiciary.

The federal judiciary should do more than pay lip service to the principle that "One of the fundamental rights of a litigant under our judicial system is that he is entitled to a fair trial in a fair tribunal . . . ." *Anderson v. Sheppard*, 856 F.2d 741, 745 (6th Cir. 1988).

On the first day of trial, the district court called petitioners' claims "ridiculous" in front of the jury. [10/10/89, RT 29] On the second day, when petitioners' counsel objected to the district court's pre-instructions to the jury that petitioners had to prove that defendants killed their son because of his ethnicity, the district court stated that petitioners' counsel were incompetent [10/11/89, RT 47], and questioned whether petitioners' counsel had attended law school. [10/11/89, RT 43] The

district court also stated, "I don't want to indicate my disgust in front of the jury, but it is regrettable that people have attorneys like you two." [10/11/89, RT 39] The district court referred to petitioners' counsel as "boys" [10/11/89, RT 52] When Mrs. Medrano testified regarding decedent's service commendations, the district court disparaged them, saying "this is something that everybody got that was in the war. . . . Come on, let's move it." [10/31/89, RT 102-103] When Mrs. Medrano testified that decedent had supported her when in Viet Nam, the district court interjected, "They all made allotments for their family. They were ordered to sit down and do it, weren't they." [10/31/89, RT 104] Learning that 1,000 people attended decedent's rosary, the district court volunteered, "concerning the dead we say nothing but good. Come on, let's go on." [10/31/89, RT 120]. Upon seeing a memorial plaque[13] created by decedent's 20 year old cousin, Janene Navia, the district court stated, "The thing is disgusting" [10/24/89, AM session, RT 6], called petitioners' counsel "stupid" [10/24/89, AM session, RT 6], threatened to put counsel "down in the holding tank in shackles" [10/24/89, AM session, RT 7], ordered the plaque to be turned over to the defendants who killed decedent [10/24/89, AM session, RT 8], and threatened to have a marshal arrest

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[13] The plaque read: "A Tribute to RUBEN P. MEDRANO, 1949-1988 As you lay in peace, our hearts mourn. Your eyes and your smile made everyone feel they were loved. We wish you knew how many people loved and cared for you. We admire you for your courage in Vietnam and at home. We know you gave of yourself to anyone who needed you. As you once said, 'Everyone is special and deserves a chance in life and God put us on this earth to love, care and help each other in our times of need.' Ruben we love you and you will be forever in our hearts."

petitioners' counsel unless the plaque was turned over to those who killed decedent. [10/24/89, AM session, RT 8]

After counsel moved to strike a non-responsive answer of field commander Tumas, the district court told petitioners' counsel, "Shut up. I'm getting sick of you." [Vol. III, 10/12/89, RT 59, 60] During the cross examination of SWAT supervisor Hancock, the court insinuated that petitioners' counsel used drugs [10/11/89, RT 161] and accused counsel of attempting to mislead the jury [10/11/89, RT 186] by "jigger[ing] these things around" and "pettifoggery." [10/11/89, RT 188] When counsel pressed SWAT team leader Anderson for an answer to the question whether he knew that breaking in might result in decedent's death, the district court stated, "You keep it up, and you'll spend a night in the hoosegow. I'm getting sick of it." [10/11/89, RT 140] Later in the cross examination, the district court told petitioners' counsel to "shut up" [10/11/89, RT 101], accused counsel of "trying to fool the Court" [10/11/89, RT 103], of being "shoddy" [10/11/89, RT 109] and stated, "Didn't they teach you that in law school." [10/11/89, RT 117]

During the cross examination of Chief Dotson, the district court imposed a limit of seven additional minutes and counted down the minutes while interrupting 19 times. [10/16/89, RT 121] During the cross examination of Lt. Hall, who was in charge of the investigation of the shooting, the district court stated that it was "sick of" petitioners' case [10/13/89, RT 59], called petitioners' counsel "lousy," "disgusting" [10/13/89, RT 61], "idiotic" [10/13/89, RT 67], and "lazy or incompetent" [10/13/89, RT 74]. During the cross examination of Investigator Holcomb, the district court stated that petitioners' counsel

was "wast[ing] our time" [10/20/89, RT 45, 69], "just pettifogging [and] picking out things to try and trap the witness" [10/20/89, RT 49], and asking "mislead[ing]" and "idiotic" questions. [10/20/89, RT 52, 54]

During the examination of petitioners' expert witness, Dr. Danto, the district court interrupted the asking of one hypothetical question 37 times [10/31/89, RT 26-33] and then cut off Dr. Danto's examination by stating to petitioners' counsel, "I said sit down. I think you've had it, not having submitted a hypothetical to the court. It's in violation of all our rules. I just don't understand how you practice law, really. It's unbelievable." [10/31/89, RT 49]

During the cross examination of defendants' firearms expert, the district court stated that what petitioners' counsel was doing was "disgusting," accused counsel of making "statements which are absolute lies," and said "I'm getting tired of this. Everybody is getting tired of it." [11/3/89, RT 112]

On the morning of November 1, 1989, the district court stated to petitioners' counsel, "I have passed your names around the court so they will know you two when you appear again, the trouble you've caused here. It's unbelievable." [11/1/89, RT 10, 11] The next day, the district court had plaintiffs' counsel remanded to custody, after initially "deputizing" one of the defendants to take custody of petitioners' counsel. [11-2-90, RT 6]

In light of such obvious hostility toward petitioners and their counsel, how is it possible to say that the district court's legal rulings were based upon the sound exercise

of discretion? Does it, for example, make any sense that petitioners' designated police use of force expert was entirely precluded from testifying about police use of force because of his supposed lack of qualifications [10/25/89, RT 139, 140], but that defendants' undesignated firearms expert was permitted to testify as an expert about psychological factors influencing the ability of police officers to recall accurately the facts of shooting incidents? [11/3/89, RT 82, 83, 84] Does it make any sense that petitioners' designated expert Dr. Danto was permitted to rely only on reports and things actually admitted into evidence [10/31/89, RT 22, 25] but that defendants' undesignated pathologist was permitted to rely on anything, including matters which were never authenticated. [11/1/89, RT 132, 138, 141]

How could the district court possibly justify arbitrarily limiting petitioners' evidence to 5 of the first 46 exhibits, "You hear me? Pick out five" [10/22/89, RT 25], or 3 of the 24 coroner's photographs [10/11/89, RT 26], or 5 of the 23 photographs of the scene [10/11/89, RT 27, 35], or 3 of the numerous training bulletins and reports related to the incident. [10/11/89, RT 28] Does it make sense that the district court refused to permit Petitioners to use documents which were poorly copied and refused to permit substitution of better copies [11/1/89, RT 76], but admitted into evidence at defendants' requests partially illegible handwritten notes by unknown persons containing alleged statements of unidentified persons? [11/1/89, RT 69, 70, 71]

It is difficult to imagine what showing is necessary if such behavior does not warrant the presumption that the court's rulings were <u>not</u> based upon the exercise of

sound discretion and what showing is necessary to require the assignment of a matter to another judge.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

ROBERT MANN, *Counsel of Record*
DONALD W. COOK
Attorneys for Petitioners

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-55250
D.C. No. CV88-2835 AAH

FILED

DEC 23 1992

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

GUADALUPE MEDRANO;
AMPARO MEDRANO, Plaintiffs-Appellants,
and
GUADALUPE MEDRANO, JR.; LOUIE MEDRANO;
LUCIA MEDRANO CASILLAS, Plaintiffs,

v.

CITY OF LOS ANGELES; VANCE PROCTOR;
WILLIAM HALL; RODOLFO ROMERO; DONNELLY
MOWRY, Defendants-Appellees.

Before: FARRIS, WIGGINS, and FERNANDEZ, Circuit Judges

The panel has voted to deny appellants' petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GUADALUPE MEDRANO; AMPARO MEDRANO,
Plaintiffs-Appellants,

and

GUADALUPE MEDRANO, JR.; LOUIE MEDRANO; LUCIA MEDRANO CASILLAS,
Plaintiffs,

v.

CITY OF LOS ANGELES; VANCE PROCTOR; WILLIAM HALL; RODOLFO ROMERO; DONNELLY MOWRY,
Defendants-Appellees.

No. 90-55250
D.C. No.
CV-88-2835-AAH
OPINION

Appeal from the United States District Court
for the Central District of California
A. Andrew Hauk, District Judge, Presiding

Argued and Submitted
July 7, 1992—Pasadena, California

Filed September 8, 1992

Before: Jerome Farris, Charles Wiggins, and
Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Wiggins

SUMMARY

Individual Rights/Civil Rights/Civil Litigation and Procedure/Evidence/Motions/Parties/Juries

Affirming in part, reversing in part and remanding for a new trial, the court of appeals held that the district court erred in ruling that appellants waived a peremptory challenge with respect to a new member of the jury panel by accepting a previous version of the panel that did not include the new member.

Appellant Guadalupe Medrano and other family members of Ruben Medrano brought a section 1983 action against certain Los Angeles Police Department officers and the City of Los Angeles for the shooting of Medrano. Police officers were called to the Medrano home after Ruben locked himself in the bathroom with a .357 magnum revolver, having injected himself with a lethal dosage of heroin, and threatened to kill anyone who tried to enter the bathroom to prevent his suicide. Aware that Medrano could die of a heroin overdose if he was not removed from the bathroom, and thinking he was already unconscious from the overdose, the police decided to enter the bathroom. As they did so, Medrano woke up and fired one shot into the wall behind him. After a struggle between Medrano and one officer for control of the gun, another officer fired three shots into Medrano. Medrano died at the scene. Seeking damages under § 1983, the Medrano family alleged that the police violated Ruben Medrano's constitutional rights by using excessive force and that the police conspired to cover up the actual events that occurred when the police entered the bathroom. The Medranos also brought several state law claims in this action, but the district court refused to exercise pendent jurisdiction over these claims and dismissed them. The district court directed a verdict for the City. In addition, the district court either dismissed or directed verdicts for all the individual defendants, except the two officers who struggled with and shot Ruben Medrano. However,

the jury returned a verdict in favor of the two officers. The Medranos appealed the directed verdicts, the dismissal of Chief Gates from the lawsuit, and numerous rulings made during the trial.

[1] Initially, the court held that the district court erred by ruling that the Medranos waived their peremptory challenge by accepting a panel before a new juror became a member of the panel. [2] In this case, the challenged alternate replaced a member of the jury and rendered a verdict. An erroneous denial of a peremptory challenge with respect to a person who becomes a member of the jury results in an automatic reversal. Because the denial of the peremptory challenge in this case was reversible error, the court reversed and remanded for a new trial against the two remaining defendant officers. [3] In addition, without evidence that the police supervisors authorized excessive force, liability could not be based merely on their order to the officers to enter the bathroom. The Medranos failed to explain how the decision to enter the bathroom violated the law. [4] Also, the alleged difference in the description of the gun shot sounds reported by the Medranos was insufficient to support a jury verdict against the investigating officers on a cover-up conspiracy theory. [5] Neither was Chief Gates liable under federal law for formally approving a forced entry alone in this case. Thus, the district court did not err in dismissing the Chief of Police from this lawsuit.

[6] The court noted that the Supreme Court and the Ninth Circuit have rejected the Medranos' argument that sections 1983 and 1988 provide an action against the City of Los Angeles because municipalities are vicariously liable under Cal. Gov't Code § 815.2(a) for actions of employees in the course and scope of their employment. The municipal liability created by California law does not expand the remedies available under federal law. [7] The Medranos also failed to produce any evidence that the City's practice, custom, or policy of allowing forced entry as a method of dealing with an armed person who was overdosing on drugs and who had ceased

communication violates federal law. Thus, the district court did not err in granting a directed verdict for the City. [8] Neither did the district court abuse its discretion in dismissing the Medranos' state law claims. [9] The district court also did not misstate the law in its jury instructions. [10] Although the court also affirmed most of the district court's evidentiary rulings, [11] it found that the district court erred in allowing impeachment of the testimony of the Medranos' witnesses by use of misdemeanor convictions not involving dishonesty or false statements and misdemeanor arrests. [12] Also, the Medranos failed to establish that the district court judge showed such extreme and obvious bias at trial warranting remand of the case to a different judge.

COUNSEL

Robert Mann and Donald W. Cook, Los Angeles, California for the plaintiffs-appellants.

Richard Mah, Deputy City Attorney and Richard M. Helgeson, Assistant City Attorney, Los Angeles, California for the defendants-appellees.

OPINION

WIGGINS, Circuit Judge:

OVERVIEW

The widow, parents, and siblings of Ruben Medrano seek damages from Los Angeles Police Department officers and the City of Los Angeles under 42 U.S.C. section 1983 for the shooting of Medrano. The Medranos appeal from directed verdicts and a jury verdict against their section 1983 claims. This court has jurisdiction over the appeal pursuant to 28 U.S.C. section 1291.

BACKGROUND

On March 21, 1988, Ruben P. Medrano left a suicide note, locked himself in his bathroom with a loaded .357 magnum revolver, injected himself with a lethal dosage of heroin, and threatened to kill anyone who tried to enter the bathroom to prevent his suicide. After his wife of three weeks, Linda Medrano, and his sister, Lucia Medrano, were unable to persuade Ruben Medrano to come out of the bathroom, they called 911 for emergency assistance. Paramedics and Los Angeles Police Department officers responded to the call. The police officers removed all of the family members from the area and initiated communication with Medrano. Medrano informed the police that he wanted to commit suicide and that he would kill anyone who came through the bathroom door to interfere.

During the communications with Medrano, the Medrano family members were allowed to speak with Ruben Medrano to persuade him to come out of the bathroom. The police took measures to prevent these family members from being shot in case Ruben Medrano opened fire. After Ruben became agitated and demanded that the family members leave, the police determined that they should be removed from the immediate area. The police continued to communicate with Ruben Medrano until he no longer responded and they could hear him snoring in the bathroom. Aware that Ruben Medrano could die of a heroin overdose if he was not removed from the bathroom, the police decided that Officer Mowry, a qualified crisis negotiator, should attempt to negotiate Ruben Medrano out of the bathroom if he was awake or to enter the bathroom to take custody of Medrano if he was still sleeping.

After listening at the bathroom door, the police formed the opinion that Ruben Medrano was in a drug induced state of unconsciousness and decided to enter the bathroom. Officer Mowry forced the door open and entered the bathroom. Lying on the floor, Ruben Medrano woke up and fired one shot into

the wall behind him. Officer Mowry grabbed the gun in Ruben Medrano's hand and struggled with Medrano for possession of the gun. Officer Romero then entered the bathroom and fired two shots into Ruben Medrano's chest. After Ruben Medrano continued struggling for possession of the gun, Officer Romero fired a final shot into Ruben Medrano's head. Medrano died at the scene.

However, the exact circumstances surrounding the fatal shooting of Ruben Medrano are disputed. When the police entered the bathroom, the Medranos heard three consecutive shots and then a delayed shot at the end. The Medranos believe that Ruben Medrano never fired his .357 magnum. According to the Medranos, the police shot Medrano three times and then staged a shot from Medrano's .357 magnum after he was already dead.

Ruben Medrano's wife, parents, and siblings brought suit against many of the police officers involved in this incident and against the City of Los Angeles. Seeking damages under 42 U.S.C. section 1983, the Medranos alleged that the police violated Ruben Medrano's constitutional rights by using excessive force and that the police conspired to cover up the actual events that occurred when the police entered the bathroom. The Medranos also brought several state law claims in this action, but the district court refused to exercise pendent jurisdiction over these claims and dismissed them. The district court directed a verdict in favor of the City of Los Angeles. In addition, the district court either dismissed or directed verdicts in favor of all the individual defendants except for Officers Mowry and Romero, the two police officers who struggled with and shot Ruben Medrano. The jury returned a verdict in favor of these two officers. The Medranos appeal the directed verdicts against them, the dismissal of Chief Gates from the lawsuit, and numerous rulings that the court made during the trial.

DISCUSSION

I. The Notice of Appeal

The appellees argue that our review should be limited to the denial of the Medranos' new trial motion because the notice of appeal mentions only the district court's order denying the motion for a new trial and says nothing about the earlier judgment. The appellees rely on Rule 3(c) of the Federal Rules of Appellate Procedure: "The notice of appeal . . . shall designate the judgment, order or part thereof appealed from . . . ." Fed. R. App. P. 3(c). This argument, however, ignores the Supreme Court's holding in *Foman v. Davis*, 371 U.S. 178 (1962). Like the Medranos in the case at bar, the appellant in *Foman* had filed an appeal from the judgment that was premature because of a pending motion to alter or amend the judgment under Fed. R. Civ. P. 59.[1] *Id.* at 180. Like the Medranos, the appellant in *Foman* filed a second notice of appeal after the district court denied the Rule 59 motion. *Id.*

Also like the present case, the appellee in *Foman* argued that the second appeal was limited to the district court's denial of the Rule 59 motion because the notice of appeal failed to specify that the appeal was being taken from the judgment as well as from the order denying the Rule 59 motion. The Supreme Court squarely rejected this analysis:

> The defect in the second notice of appeal did not mislead or prejudice the respondent. With both notices of appeal before it (even granting the asserted ineffectiveness of the first), the Court of Appeals should have treated the appeal from the denial of the motions as an effective, although inept, attempt to appeal from the judgment sought to be

[1]The Medranos' appeal from the district court's judgment was dismissed as premature because a motion for a new trial under Rule 59(a) was pending.

> vacated. Taking the two notices and the appeal papers together, petitioner's intention to seek review of both the [judgment] and the denial of the motions was manifest. Not only did both parties brief and argue the merits of the earlier judgment on appeal, but petitioner's statement of points . . . similarly demonstrated the intent to challenge the [judgment].
>
> It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities.

Id. at 181.

The appellees are unable to distinguish the present case from *Foman*. Contrary to the appellees' assertions, when a prior notice of appeal from a judgment is premature, Fed. R. App. P. 3(c) allows a later notice of appeal from the denial of a Rule 59 motion to serve as a notice of appeal from the underlying judgment. *Id.*; *In re Nicholson*, 779 F.2d 514, 515-16 (9th Cir. 1985); *see also Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316-17 (1988) (explaining *Foman*). *Foman* clearly governs this issue, and we therefore treat the Medranos' notice of appeal as an appeal from the earlier judgment of the court.

II. The Peremptory Challenges

The Medranos argue that the district court erred by allowing the appellees one peremptory challenge to remove an alternate juror and then refusing to allow the Medranos the same right. The district court first gave the Medranos the opportunity to exercise a peremptory challenge to remove one of the two alternate jurors (Mrs. Spitz and Mr. Andriacchi). The Medranos accepted the alternates as called. The appellees, however, used their one peremptory challenge to excuse Mrs. Spitz and replace her with Mr. Herrington. The

Medranos then attempted to use their one peremptory challenge to remove Mr. Herrington. The court ruled that the Medranos had already used their peremptory by accepting the alternates. The court stated, "You only have one. You accepted the panel. You lost it." The Medranos tried to explain that they had indeed accepted Mr. Andriacchi but had never accepted Mr. Herrington. The court, however, rejected the Medranos' argument and swore the alternates.

[1] The district court erred by ruling that the Medranos waived their peremptory challenge by accepting a panel before a new juror became a member of the panel. The case law is clear on this issue:

> "[A]cceptance of a panel cannot be deemed a waiver of a peremptory challenge in respect of [sic] a person who was not a member of the panel at the time the jury was accepted." [*United States v. Turner*, 558 F.2d 535, 538 (9th Cir 1977)]. [Plaintiff's] acceptances of the panel did not waive his right to an otherwise unexhausted peremptory challenge against the [replacement juror], who was not a member of the panel when [the plaintiff] did accept it.

Landes Constr. Co. v. Royal Bank of Canada, 833 F.2d 1365, 1369 (9th Cir. 1987). Even the appellees appear to concede that the district court erred. Thus, the issue is whether the error was reversible error.

[2] The appellees argue that the erroneous denial of a peremptory challenge to an alternate juror is harmless error. They argue that *Beard v. Mitchell*, 604 F.2d 485, 500 (7th Cir. 1979) sets forth "the doctrine with respect to alternate jurors." However, *Beard* merely holds that the error is harmless if the alternates never replace any member of the jury. *Id.* at 500. In contrast to *Beard*, the challenged alternate in this case replaced a member of the jury and rendered a verdict. An erroneous denial of a peremptory challenge with respect to a

person who becomes a member of the jury results in an automatic reversal. *See Turner*, 558 F.2d at 538; *Carr v. Watts*, 597 F.2d 830, 833 (2d Cir. 1979). The denial of the peremptory challenge in this case was reversible error. Therefore, we reverse and remand for a new trial.[2]

III. The Supervisory and Investigatory Defendants

The district court granted directed verdicts in favor of most of the individual defendants in this case. The district court's grant of a motion for a directed verdict or a motion for JNOV is reviewed by applying the same standard that must be used by the district court. A directed verdict or JNOV is proper when "the evidence and its inferences, considered as a whole and viewed in the light most favorable to the nonmoving party, can support only one reasonable conclusion." *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1151 (9th Cir. 1988).

[3] The Medranos argue that the on scene supervisors and team leaders (Sergeants Tumas, Slinkard, Hancock and Officer Anderson) are liable under section 1983 for ordering officers to break into the bathroom and take Medrano into custody. Without evidence that the supervisors authorized excessive force, liability cannot be based merely on the decision to enter the bathroom. The uncontradicted evidence in this case shows (1) that Medrano would die of a drug overdose unless he was taken from the bathroom and given medical treatment, (2) that efforts to talk him out of the bathroom had failed, and (3) that he was not responding to any commu-

[2]The appellees argue that the Medranos somehow waived their right to appeal the district court's erroneous ruling by failing to object when two of the regular jurors were excused in this case. This argument is meritless, and the appellees have failed to cite a single case which supports this theory. By failing to object when the jurors were excused, the Medranos probably did waive any claim that the two regular jurors were excused improperly, but they did not waive their earlier claim that one of the alternates should have been removed by a peremptory challenge.

nication and appeared to be unconscious already. Given these facts, the decision to enter the bathroom was reasonable. The Medranos have failed to explain how the decision to enter the bathroom violated the law. There is no law requiring the on scene supervisors to stand by and let Medrano die of a drug overdose, and there is no evidence showing that the on scene supervisors knew or should have known that the decision to enter the bathroom would cause some unconstitutional injury. Without some evidence that the on scene supervisors authorized use of excessive force, the decision to enter the bathroom cannot reasonably support a judgment in favor of the Medranos. *See Meehan v. County of Los Angeles*, 856 F.2d 102, 106 (9th Cir. 1988) (absent evidence that a supervisor instructed or authorized use of excessive force, a directed verdict is proper).

[4] The Medranos also allege that the officers investigating the Medrano incident (Captain Proctor and Lieutenant Hall) conspired in a cover-up. The Medranos argue that their description of the gun shot sounds differs from the description in the police report. However, the Medranos' characterization of the police report is misleading. The police report and the officers' testimony at trial is consistent with the gun shot sounds reported by the Medranos. Simply put, the alleged difference in the description of the gun shot sounds is insufficient to support a jury verdict against Proctor and Hall on a cover-up conspiracy theory.

The flash burn on Medrano's chest from the .357 magnum is also insufficient to support a jury verdict against Proctor and Hall on a cover-up conspiracy theory. Both expert pathologists at trial stated that the flash burn could be ante-mortem. Thus, the evidence is entirely consistent with the investigatory conclusion that the flash burn occurred when Ruben Medrano fired the gun into the wall as he was lying on the floor.

According to Dr. Thomas, the tissue reaction to the flash burn proved that the burn was ante-mortem. Dr. Shipley also

admitted that the burn could be ante-mortem. Thus, it is not evidence of a cover-up conspiracy that Proctor and Hall either assumed the burns were ante-mortem or simply did not suspect that the burns were post-mortem. Given the facts known by Proctor and Hall, and without expert medical evidence to the contrary, the most reasonable assumption was that the burns were ante-mortem. Moreover, Proctor and Hall do not possess the medical training to determine from a visual inspection whether a flash burn is ante-mortem or post-mortem, and they cannot be held liable merely because they made a reasonable assumption in the course of their investigation that the burn occurred when Medrano fired the gun. In short, there is simply no evidence that Proctor or Hall were involved in a cover-up.

[5] The Medranos finally assert that, similar to the on scene supervisors, the Chief of Police (Chief Gates) is liable for formally approving forced entry as a means to obtain custody of an armed individual who is dying of a drug overdose and who has ceased communications. The Medranos argue that because forced entry is "reckless" and "ill-advised," the Chief of Police is liable under section 1983. Like the Medranos' claims against the on scene supervisors, the Medranos have failed to show that a decision to make a forced entry violates federal law. Indeed, the Medranos have failed to show that forced entry is even reckless or ill-advised. A decision to allow a forced entry alone is insufficient to support a jury verdict against the Chief of Police. The district court did not err in dismissing the Chief of Police from this lawsuit.

In summary, the district court did not err in granting the motion for directed verdicts in favor of defendants Tumas, Slinkard, Hancock, Anderson, Proctor, and Hall. Nor did the court err by dismissing Gates from the lawsuit.

IV. The Directed Verdict for the City of Los Angeles

The Medranos argue that a municipality may be held vicariously liable for an employee's violation of section 1983 if

state law mandates such liability. In *Hesselgesser v. Reilly*, 440 F.2d 901 (9th Cir. 1971), this court determined that "the Civil Rights Act does authorize the application, under appropriate circumstances, of state laws pertaining to vicarious liability and liability created by statute." *Id.* at 903. The court in *Hesselgesser* also held that the prime issue is whether state law imposes vicarious liability for the actions of public employees. *Id.* Relying upon *Hesselgesser*, the Medranos argue that 42 U.S.C. sections 1983 and 1988 provide an action against the City of Los Angeles because municipalities are vicariously liable under Cal. Gov't Code section 815.2(a) for actions of employees in the course and scope of their employment.

[6] This court and the Supreme Court have rejected this argument. In *Moor v. Madigan*, 458 F.2d 1217, 1219-20 (9th Cir. 1972), *aff'd in part, Moor*, 411 U.S. 693 (1973), this court limited *Hesselgesser* and held that the municipal liability created by California under section 815.2(a) did not expand the remedies available under federal law. The Supreme Court agreed with this analysis and affirmed this part of the Ninth Circuit's opinion in *Moor v. County of Alameda*, 411 U.S. 693, 698-710 (1973). The Court held that Congress did not intend to impose vicarious liability on municipalities under section 1983 and that, although states are free to impose vicarious liability, section 1983 cannot be used as the means to impose such liability. *Id.* at 710 & n.27; *see also Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 691-94 (1978). Section 1983 is an express federal damages remedy that cannot be expanded by state law. *See Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 732-33 (1989).

In short, the Medranos' reliance on *Hesselgesser* and section 815.2(a) is misplaced. Federal courts may look to state law under *Hesselgesser* only "under appropriate circumstances," 458 F.2d at 1220 (quoting *Hesselgesser*, 440 F.2d at 903), where the state law is consistent with the damages remedy provided by Congress.

[7] The Medranos also argue that the City of Los Angeles is liable under section 1983 because it had a custom, practice, or policy of allowing forced entry as a method of dealing with an armed person who was overdosing on drugs and who had ceased communications. As discussed above, the Medranos have failed to produce any evidence that such a practice violates federal law. The record fails to support even the Medranos' vague conclusory allegations that the practice is reckless and ill-advised. Therefore, the district court did not err in granting the motion for a directed verdict in favor of the City of Los Angeles.

V. Pendent Jurisdiction

The Medranos also argue that the district court erred by refusing to exercise pendent jurisdiction over the Medranos' state law claims because all of the claims are derived from a common nucleus of operative fact. The Medranos misunderstand the two-part analysis governing pendent jurisdiction. The Medranos are correct that a federal court has the power to entertain state law claims when both the federal and state claims "derive from a common nucleus of operative fact." *Moor*, 411 U.S. at 711 (quoting *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966)). However, whether the court has the power to exercise pendent jurisdiction does not end the inquiry. "That power need not be exercised in every case in which it is found to exist. It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." *Gibbs*, 383 U.S. at 726; *see also Moor*, 411 U.S. at 716 (district courts are given "broad discretion" in evaluating whether pendent jurisdiction is appropriate).

[8] In this case, the state claims involved complicated state law issues of ascendant and collateral heirship, intestate succession, negligent retention, and negligent infliction of emotional distress. Thus, the district court used its discretion so that it "would [not] be called upon to resolve difficult ques-

tions of California law." *Moor*, 411 U.S. at 715-16 (citation omitted). Moreover, "an examination of the posture in which the nonfederal claim[s were] asserted" reveals that the Medranos voluntarily chose to pursue their state law claims in federal court. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 373 (1978). "A plaintiff cannot complain if ancillary jurisdiction does not encompass all of his possible claims in a case such as this one, since it is he who has chosen the federal rather than the state forum and must thus accept its limitations." *Id.* at 376. If the Medranos wanted to bring all of their claims in the same forum, they should have selected the state court. The district court did not abuse its discretion in dismissing the Medranos' state law claims.

VI. Jury Instructions

In reviewing jury instructions, the standard applied in this circuit is "whether, considering the charge as a whole, the court's instructions fairly and adequately covered the issues presented, correctly stated the law, and were not misleading." *Thorsted v. Kelly*, 858 F.2d 571, 573 (9th Cir. 1988); *see also United States v. Beltran-Rios*, 878 F.2d 1208, 1214 (9th Cir. 1989). The district court's jury instructions meet this standard.

The Medranos complain that the court's remarks to the jury at the beginning of the trial misstated the law as requiring racial animus as an element of an excessive force claim. Taking the jury instructions as a whole, it is clear that the court did not misstate the law. At the beginning of the trial, the court made it clear that the Medranos were claiming that excessive force violates a constitutional right to the security of a person's body. The court did tell the jury that the Medranos may have to prove that the excessive force was motivated, as the complaint alleged, by some racial or ethnic animus. However, the court warned the jury that the court needed to do more research to determine whether the use of excessive force alone is a constitutional violation. When the court completed its research and instructed the jury at the end

of the trial, the court made it clear that the Medranos needed only to show excessive or unreasonable force to prevail. The alleged misstatement of the law is only a misstatement if it is read out of context and the instructions are not considered as a whole.

[9] The district court also instructed the jury that a citizen has no power to relieve police officers from their duty to protect the public by signing some kind of waiver. The Medranos argue that this is a misstatement of the law and that a citizen, by signing a waiver, may relieve the police of their legal responsibility to protect the public. The Medranos have failed to provide any authority to support this argument, and there is no California law granting citizens the right to relieve police of their duty by signing a waiver. The district court did not misstate the law on this issue.

VII. Evidentiary Rulings

[10] Evidentiary rulings are reviewed for an abuse of discretion and will be sustained unless they are "manifestly erroneous." *Transgo, Inc. v. Ajac Transmission Part Corp.*, 768 F.2d 1001, 1020 (9th Cir. 1985), *cert. denied*, 474 U.S. 1059 (1986); *Roberts v. College of the Desert*, 870 F.2d 1411, 1418 (9th Cir. 1988). The district court ruled (1) that Mr. Saunders had no specialized knowledge that would assist the trier of fact under Fed. R. Evid. 702; (2) that Mr. Flores did possess specialized knowledge that would assist the jury under Fed. R. Evid. 702; (3) that the relevance of additional materials written by Mr. Klyver and other training materials was substantially outweighed by the danger of confusion of the issues, undue delay, and waste of time under Fed. R. Evid. 403; (4) that under Fed. R. Evid. 602 there was no foundation for testimony regarding an alleged conversation because the witness could not remember having the conversation and had made no notes of such a conversation; (5) that circumstantial evidence was sufficient to establish the authenticity of certain notes from the investigation of the Medrano incident under

Fed. R. Evid. 901(a) and that the notes were excepted from the hearsay rule under Fed. R. Evid. 803(8); and (6) that under Fed. R. Evid. 703 Dr. Thomas's expert opinion could be based in part on slides provided by defense counsel showing the body of Medrano after the fatal incident. Although reasonable minds could have reached different conclusions, the district court's rulings are not manifestly erroneous. Therefore, we affirm these evidentiary rulings.

[11] However, the district court allowed the appellees to impeach the testimony of the Medranos' witnesses by use of misdemeanor convictions and arrests. The Medranos' objections to this method of impeachment were timely, and they preserved this alleged error for appeal. Fed. R. Evid. 609 does not allow the use of prior arrests for purposes of impeachment. Although Rule 609 does allow the use of convictions for impeachment, it limits the use of misdemeanor convictions to those involving dishonesty or false statements. Fed. R. Evid. 609(a)(2). The misdemeanor convictions used for impeachment in this case were mainly drug use and shoplifting convictions. These convictions did not involve dishonesty or false statements. *See United States v. Ortega*, 561 F.2d 803, 805-06 (9th Cir. 1977) (shoplifting does not involve dishonesty or false statements within the meaning of Rule 609(a)(2)); *United States v. Ashley*, 569 F.2d 975, 979 (5th Cir.) (same), *cert. denied*, 439 U.S. 853 (1978). Therefore, the district court erred by allowing the use of these convictions for impeachment.

VIII. Voir Dire

The Medranos argue that the district court erred by refusing to ask questions regarding the jurors' attitudes about suicide, drug use, firearms, racial prejudice, the proper extent of police authority, police abuse of authority, excessive force, and the appropriateness of awarding monetary damages for death and injuries. "A district court has considerable discretion to accept or reject proposed questions, however, and as long as it con-

ducts an adequate voir dire, its rejection of a [party's] specific questions is not error." *United States v. Giese*, 597 F.2d 1170, 1182-83 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979); *see also Rosales-Lopez v. United States*, 451 U.S. 182, 189 (1981) (federal judges have "ample discretion" to determine which questions to ask in voir dire). The district court gave the jurors an overview of the case and then questioned the jurors regarding employment, marital status, spouse's employment, and whether any friends or relatives were members of law enforcement agencies. The court also asked the jurors whether they had any prejudices or biases that would prevent them from being fair and impartial in the case. Three jurors admitted that they might be unable to be impartial and were excused. After reviewing the record, we find that the district court's voir dire was adequate and that the court sufficiently probed for prejudice and bias. "[T]o conserve time and avoid confusion," the court was justified in refusing to ask the specific questions proposed by the Medranos. *Giese*, 597 F.2d at 1183. We therefore affirm the district court's voir dire.

IX. Assignment to a Different Judge on Remand

The Medranos assert that the district court judge showed such extreme and obvious bias at trial that the case should be remanded to a different judge. "In the absence of proof of personal bias, [this court] remand[s] to a new judge only under 'unusual circumstances.' " *United States v. Sears, Roebuck & Co.*, 785 F.2d 777, 780 (9th Cir.) (quoting *United States v. Arnett*, 628 F.2d 1162, 1165 (9th Cir. 1979)), *cert. denied*, 479 U.S. 988 (1986). In making this determination, the court must consider three factors:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the

> appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Id. (quoting *Arnett*, 628 F.2d at 1165).

The first factor militates in favor of remanding this case back to the same judge. The Medranos have failed to show that the district court would be unable or unlikely to correct its erroneous rulings on remand. The second factor also militates in favor of remand to the same judge. The Medranos' attorneys and the court did show a mutual lack of respect, and the court was provoked into losing its patience and engaging in some injudicious behavior, such as criticizing the attorneys in front of the jury. However, most of the behavior that the Medranos rely upon, such as calling the attorneys "boobs," occurred outside the presence of the jury. After reviewing the record, we trust that the instances of injudicious conduct in front of the jury and the appearance of bias can be corrected (1) by admonishing the district court to avoid critiquing the attorneys' trial tactics in front of the jury and to avoid derogatory comments at all times and (2) by warning the attorneys to be on better behavior.

[12] The third factor weighs heavily in favor of remand to the same judge. The district court is already familiar with the issues and theories advanced in this case. Reassignment to another court to start from scratch would entail a significant amount of waste and duplication. Therefore, we remand this case back to the same judge.

CONCLUSION

The district court erred by ruling that the Medranos waived a peremptory challenge with respect to a new member of the panel by accepting a previous version of the panel that did not include the new member. The court also erred by allowing the use of misdemeanor convictions and arrests to impeach a wit-

ness. The remainder of the district court's rulings—including the dismissal of defendant Gates and the directed verdicts in favor of defendants Tumas, Slinkard, Hancock, Anderson, Proctor, and Hall—are affirmed. Therefore, we remand for a new trial against the two remaining defendants, Officers Mowry and Romero.

REVERSED in part and AFFIRMED in part.

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